



SURPRISE! You may be liable for union pension plan withdrawal liability

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When a participating employer stops contributing to, or no longer has an obligation under a collective bargaining agreement (CBA) to contribute to, an underfunded multiemployer (union) pension plan, the employer may be liable for “withdrawal liability” even though it always paid its required annual contributions to the pension plan. Withdrawal liability can be triggered when an employer has a significant union workforce reduction (a partial withdrawal), a complete union workforce reduction (a complete withdrawal), or a withdrawal of all employers from the pension plan (a mass withdrawal). Withdrawal liability is imposed by statute under ERISA and employers are also subject to the contractual terms of the multiemployer pension plan. In four recent examples involving a complete withdrawal, the employer’s withdrawal liability was in the range of 80% to 400% of the employer’s total contributions to the multiemployer pension plan for the last 10 years.

The employer is primarily responsible for paying the withdrawal liability, but other businesses which have common ownership with the employer will also be liable. Shareholders of an incorporated business, partners in a partnership, or an alter ego or successor business may also be responsible for withdrawal liability if the participating employer does not pay the withdrawal liability to the pension plan.

The following is an explanation of the potential liability of individuals and entities, other than the employer, when the participating employer becomes insolvent and can’t pay the withdrawal liability.

Individual Liability

Owners of a corporation or limited liability company (LLC) are generally not liable for withdrawal liability unless the pension plan can “pierce the corporate veil” under state law. This sometimes is allowed if owners do not operate with corporate or LLC formalities. However, individuals have been found personally liable for withdrawal liability when they own an unincorporated business. Unincorporated businesses are under common control with the

business that owed the withdrawal liability if the individual and certain close family members own 80% of that business. This can occur, for instance, when an individual owns real estate and leases it to the operating entity or when the individual owns an unincorporated business with no connection to the operating entity, such as vacation rental property.

Liability of Commonly Owned Businesses

All entities which are considered under common control (i.e., a parent–subsidiary group or a brother–sister group) as determined by Internal Revenue Service regulations are jointly and severally liable for the withdrawal liability if the participating employer does not pay the liability.

A parent–subsidiary group is two or more trades or businesses in which 80% or more of the voting power or ownership value of all the organizations is owned by other members of the group and a common parent owns at least 80% of the voting power or ownership value of at least one member of the group. A brother–sister group is two or more trades or businesses in which:

- the same five or fewer persons who are individuals, estates, or trusts directly or indirectly own 80% or more in each organization, and
- taking into account the ownership of each such person only to the extent such ownership is identical with respect to each such organization, such persons own more than 50% of each organization.

The five or fewer persons whose ownership is considered for purposes of the 80% requirement for each organization must be the same persons whose ownership is considered for purposes of the 50% requirement.

For example, if corporation A owns 80% or more of corporation B, the two corporations are a parent–subsidiary group. If individual C owns 80% or more of corporations D and E, the two corporations are a brother–sister group.

Successor Employer Liability

A purchaser of assets generally does not acquire a seller's liabilities, but some federal courts have found a buyer of assets liable for the seller's withdrawal liability as a successor business. Successor businesses to entities which are assessed withdrawal liability have been found liable for unpaid withdrawal liability if they:

- had notice of the liability and
- continued the business of the predecessor entity (typically referred to as a "continuity of operations") after purchasing the assets of such entity.

Notably, this exposure is a continually evolving area of the law with several relevant decisions issued in the last few years.

A union pension plan does not necessarily have to prove that the successor had actual notice of the liability to meet the notice requirement referenced to above. Courts have held that the notice requirement is met not only by facts that conclusively demonstrate actual knowledge, but also by implied knowledge from the circumstances (i.e., reasonably inferred) or by constructive notice (i.e., a reasonable purchaser would have discovered the liability).

Whether the continuity of operations test is met is fact specific. In making this determination, the court may consider whether the buyer has the same employees, location, equipment, products, customers, and methods of production as the seller and whether it finished the seller's orders, in addition to other factors.

The "successor employer" doctrine of imposing withdrawal liability has typically arisen in cases when:

- the seller did not pay the withdrawal liability assessed by the union pension plan, usually because it could not afford to pay it, and
- the buyer operated a non-union shop or otherwise did not contribute to that union pension plan.

If the buyer of assets intends to be a participating employer and contribute to the pension plan on behalf of the union employees, the "Sale of Assets" exemption under ERISA Section 4204 can be used to avoid assessment of withdrawal liability on the seller. For the seller to qualify for this exemption, the buyer must commit to

contribute to the pension plan for substantially the same number of contribution base units (CBUs) for which the seller contributed (See Item #5 in our earlier article ["17 Ways to Avoid or Reduce Multiemployer Pension Plan Withdrawal Liability"](#)).

Liability of Private Equity Investors

A private equity fund that owns an interest in an operating entity (sometimes referred to as a "portfolio company") can be liable for withdrawal liability that is originally assessed to the operating entity if the private equity fund's involvement in the operating entity is sufficiently active as to render the private equity fund a "trade or business" (i.e., not a passive investor) in common control with the operating entity.

In the ***Sun Capital Partners*** cases, federal courts determined that two Sun Capital funds were not merely "passive investors," but "trades or businesses" because they operated and managed the operating entity and were provided a direct economic benefit that an ordinary passive investor would not derive. The courts applied what is referred to as the "investment plus" test (i.e., the owner is more than just a passive investor) in making the determination that the Sun Capital funds were "trades or businesses." Fortunately for the funds, the U.S. First Circuit Court of Appeals in a decision issued in 2019 held that because (1) neither Sun Capital fund owned at least 80% of the operating entity and (2) the two funds were determined not to be in an implied partnership with each other, the two funds were not considered in common control with the operating entity and thus not responsible for the operating entity's withdrawal liability. In 2020, the U.S. Supreme Court refused to review the Circuit Court of Appeal's decision. As a result, the decision remains the controlling law on these issues in the jurisdiction of the First Circuit which covers Maine, Massachusetts, New Hampshire, Rhode Island and Puerto Rico and the decision may be followed by federal courts in other jurisdictions in the future.

Liability Under Alter Ego Doctrine

Entities have also been found liable for withdrawal liability as an "alter ego" of the employer which did not pay its withdrawal liability. The alter ego doctrine was developed in the context of the National

Labor Relations Act, but the courts determined the doctrine also has relevance in the ERISA context. Though the result may be similar to a “successor employer” finding as described above, the test is somewhat different in that it generally requires (1) commonality of ownership, management, operations and/or labor relations between the original employer and other entity; and (2) a sham transaction or technical change in operation to avoid obligations of the original employer. That is, was a new entity that is effectively the old entity created to carry on the business of the old entity, or to operate simultaneously with the old entity, but with intent to avoid some of the obligations of the old entity.

Liability of Employer without Bargaining Agreement or Plan Participation Agreement

An employer may be liable for withdrawal liability if its “obligation to contribute” to a multiemployer pension plan arose under “one or more collective bargaining (or related) agreements, or under applicable labor-management relations law” as provided in ERISA Section 4212(a). Congress’ legislative history regarding ERISA Section 4212 indicates the phrase “(or related) agreements” means “any situation in which an employer has directly or indirectly agreed to make contributions to a plan including cases in which an employer signs a CBA or memorandum of understanding, and in cases in which the employer agreed to be bound by an association agreement.”

Some courts have held that an employer has an obligation to contribute to a union pension plan (and thus is subject to withdrawal liability) even though the employer is not a party to a CBA. This issue has even been raised by some pension plans when an employer is not contributing any of its own funds to the plan but is only withholding pension contributions from employees’ wages and contributing those amounts to the plan. So, an employer does not necessarily have to be a signatory to a CBA to be at risk of being assessed withdrawal liability by a pension plan.

Tips on Avoiding Withdrawal Liability

- Don’t agree to contribute employer or employee contributions to a pension plan when bargaining without

reviewing the current plan financial information, the plan document and the plan participation or joinder agreement.

- Don't sign a collective bargaining agreement which requires employer or employee contributions to a pension plan without reviewing the current plan financial information, the plan document and the plan participation or joinder agreement.
- Don't purchase assets or equity of a business without investigating whether there has been any union plan participation by the business being purchased or any of its related entities and, if there has, the potential for liability.
- If purchasing a business with withdrawal liability exposure, obtain an estimate of the liability from the pension plan, require a contractual indemnity from the seller for the liability and require that an escrow fund be set up at closing equal to the liability.
- If purchasing a business that contributes to a multiemployer pension plan with intent to continue contributions so withdrawal liability will not be currently assessed, investigate the funded status of the plan. Withdrawal liability can be many times the amount of the employer's annual contribution obligation as described above.
- Be aware that some multiemployer pension plans purporting to be well funded for government reporting purposes use a lower interest rate for calculating withdrawal liability than they use for funding purposes, which will result in withdrawal liability when you might not otherwise expect it.
- Be aware that personal assets such as rental real estate in an unincorporated business could be exposed to withdrawal liability if that business is in "common control" with the business that participates in the multiemployer pension plan.

For more background on withdrawal liability generally, visit Frost Brown Todd's website to read [our previous article "Union Pension Plan Participation Can Create Massive Unexpected Liabilities."](#)

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